2008

State of Utah v. Jesse Valdez : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellant, vs. JESSE VALDEZ, Defendant/Appellee	Case No. 20080946-CA

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH,
FROM A PRE-TRIAL DISMISSAL, THE HONORABLE JAMES R. TAYLOR PRESIDING

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BRIEF OF APPELLEE

JURISDICTION OF THE UTAH COURT OF APPEALS

The State appeals the trial court's dismissal of two criminal charges: possession of a controlled substance in a drug-free zone and possession of drug paraphernalia in a drug-free zone. This Court has jurisdiction under Utah Code § 78A-4-103(2)(e) (2008).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. *Issue*: Whether the trial court correctly concluded that Officer Robertson's hearsay statement was unreliable under Rule 1102(b)(6) of the Utah Rules of Evidence because the officer did not sufficiently identify that the details of the search came from a fellow officer.

Standard of Review: Whether statements are "reliable" under the Utah Rules of Evidence is a factual issue, which is reviewed under the *clearly erroneous* standard. See, State v. Allred, 2002 UT App 291, ¶ 10, 55 P.3d 1158, 1161; and State v. Parker, 2000 UT 51, ¶ 13, 4 P.3d 778, 781.

2. *Issue*: Whether the trial court correctly declined to bind over the charges based on insufficient evidence.

Standard of Review: "[T]he review of a bind over decision is based upon a correctness standard ... [however,] the reviewing court should give some deference to a magistrate's factual findings." State v. Redd, 954 P.2d 230, 233-34 (Utah Ct. App. 1998), rev'd on other grounds, State v. Redd, 1999 UT 108, 992 P.2d 986, (citing State v. Wodskow, 896 P.2d 29, 31 (Utah Ct. App. 1995)); and State v. Virgin, 2006 UT 29, ¶ 34, 137 P.3d 787, 795.

CONTROLLING CONSITUTIONAL PROVISIONS, STATUTES, AND RULES

All necessary constitutional and statutory provisions, as well as rules, are included in the Addenda.

STATEMENT OF THE CASE

In July, 2008, Jesse Valdez was charged by Information with: (1) Possession or Use of a Controlled Substance, a third-degree felony, under Utah Code § 58-37-8(2)(a)(i); and (2) Possession of Drug Paraphernalia, a class B misdemeanor, under Utah Code § 58-37a-5(1). (R. 2). Subsequently, the State amended the charges and alleged them to have taken place within a drug-free zone, which enhanced them by one degree. (R. 18).

After hearing testimony during a Preliminary Hearing held on August 28, 2008, the Honorable James R. Taylor determined that the State failed to meet its burden of proof and did not bind over the charges. (R. 40: 16-17). The State filed a Motion for Reconsideration of Denial of Bindover or Request for Permission to Refile Charges on

September 9, 2008. (R. 27-20). On October 8, 2008, after consideration of the State's motion, the Honorable James R. Taylor reaffirmed that the testimony presented was not "'reliable hearsay' and ... was insufficient to meet the burden of proof required at a preliminary hearing." (R. 31).

The State filed its Notice of Appeal on November 10, 2008. (R. 38).

STATEMENT OF FACTS

Valdez was on supervised probation under the care of Agent Kirt Robinson of Adult Probation and Parole. (R. 40: 3). On July 12, 2008, at approximately 1 o'clock in the morning, Agent Robinson, assisted by Officers Barker and Wolcott, conducted a field visit to Defendant's home. (R. 40: 3). Robinson testified that he conducted the field visit based on information that Defendant sold methamphetamine passed from "various people" to local law enforcement agencies, which was subsequently passed to Robinson. (R. 40: 3-4).

When the officers arrived to Defendant's residence – which was a shed located adjacent to his mother's mobile home – Robinson knocked on the door and Defendant answered. (R. 40: 4-5). Robinson asked if he could come in and Defendant consented. (R. 40: 5). Defendant was the only person in the home. (R. 40: 5).

Once inside, Robinson informed Defendant of the allegation that he was selling methamphetamine and asked if there was any in the home or on his person. (R. 40: 5). Defendant denied selling methamphetamine. (R. 40: 5). Robinson searched Defendant and found nothing, then he searched the couch and found nothing. (R. 40: 5). Robinson then sat Defendant down on the couch and continued his search. (R. 40: 5).

Because Robinson believed the residence to be "extremely cluttered," he requested a canine officer to come and do a sweep of the area. (R. 40: 6). Deputy Nielsen of the Utah County Sheriff's Office arrived with his canine. (R. 40: 6). Because of the cramped space, Deputy Nielsen asked Robinson to remove Defendant. (R. 40: 7). Both Robinson and Defendant waited outside of the residence as the canine performed its sweep. (R. 40: 7).

The canine made an initial indication around the bed. (R. 40: 7). Nothing was found. (R. 40: 7). Deputy Nielsen and Officer Barker told Robinson that during a second sweep, after the canine indicated in the same area, the indication was "towards the ceiling of the shed." (R. 40: 7). Robinson was not present, but remained outside with Defendant. (R. 40: 7).

Subsequently, Robinson testified that Officers Barker and Wolcott searched the top of the shed, which was covered in a tarp. (R. 40: 8). Robinson then stated that Wolcott reached through a slit in the tarp and retrieved a syringe, a small baggie with crystalline residue in it, and digital scales. (R. 40: 8). And also, next to the bed was a carburetor. (R. 40: 8). Robinson testified that the carburetor was taken apart and inside was a baggie that contained a baggie that contained crystalline substance in it. (R. 40: 8). Robinson testified that both substances field tested positive for methamphetamine. (R. 40: 9).

On cross-examination and re-direct, Robinson testified that he remained outside during these searches and did not personally observe them. (R. 40: 10, 14). Furthermore, defense counsel clarified that when Robinson testified about the tarp and carburetor

search he did not personally observe the searches, nor was he involved in removing the items from the location. (R. 40: 12). Also, Robinson did not perform the field tests, but observed Officer Barker perform them. (R. 40: 13).

On re-direct, the State's attorney asked:

MS. THOMAS – FISHBURN: Did you observe the search yourself - - were you able to see it from where your were standing with Mr. Valdez?

MR. ROBINSON: Um - - the third - - where the - -

MS. THOMAS – FISHBURN: The search with - -

MR. ROBINSON: - the items were actually found?

MS. THOMAS –FISHBURN: Right.

MR. ROBINSON: No. I was not. I did not observe it.

MS. THOMAS-FISHBURN: Okay. The officers told you what they found.

MR. ROBINSON: Yes.

(R. 40: 14).

SUMMARY OF ARGUMENT

A statement from a non-testifying officer to a testifying officer is reliable, but only so long as the statement originates among officers. And, to establish that the statement was passed between officers, there must be clear testimony from the testifying officer that the statement/information he is relaying originated from another officer. Here, the trial court correctly concluded that Agent Robinson's testimony was "unreliable" because the source of the information was never established. Therefore, because Agent Robinson's testimony was unreliable – in that that trial court did not find that the information came

from another officer - the trial court did not abuse its discretion by ruling that the hearsay testimony did not conform with Rule 1102(b)(6) of the Utah Rules of Evidence.

Furthermore, the State failed to raise other Rule 1102 exceptions to hearsay that the trial court could have ruled on. Thus, these matters should not be addressed on Appeal. If, however, this Court concludes that other 1102 exceptions were properly raised, Defendant argues that they are not dispositive because they either do not apply or their unreliability is fatal.

Additionally, because Agent Robinson's statements were "unreliable" hearsay, no independent bases of facts were presented at the preliminary hearing to satisfy the probable cause requirement. Without the hearsay, Agent Robinson's personal-knowledge statements only establish that he arrived at Defendant's home and that he remained outside with Defendant. Again, without the hearsay, Robinson cannot testify that a search was conducted which revealed contraband. As such, insufficient evidence was presented at the preliminary hearing for the trial court to conclude that a crime was committed and that Defendant committed it.

Moreover, whether the trial court permitted the State to continue the hearing under 1102(c) is a discretionary matter. The trial court acted appropriately, and within its authority, by not granting the State a continuance. And, by doing so is not evidence of the trial court's unreasonableness.

Finally, defense counsel properly objected to the sufficiency of evidence at the preliminary hearing. Although defense counsel did not make a contemporaneous objection to the hearsay, it was clearly presented before the court and before final

judgment. Thus, the trial court was allowed to consider whether or not to take Agent Robinson's hearsay testimony into account. Therefore, the trial court acted appropriately by considering defense counsel's argument.

ARGUMENT

I. The Trial Court Correctly Concluded that the Agent's Testimony was "Unreliable" Hearsay under Rule 1102 of the Utah Rules of Evidence

Hearsay presented at a preliminary hearing is not presumptively admissible; rather it becomes admissible only by offering some quantum of reliability. See, Utah R. Evid. 1102(b) (1999); State v. Rhinehart, 2006 UT App 517, ¶ 15 n. 5, 153 P.3d 830 (hearsay evidence is admissible at the preliminary hearing as long as that evidence is reliable). At the preliminary hearing, the State failed to present evidence that Agent Robinson's testimony qualified as an exception to the hearsay rule under Rule 1102 of the Utah Rules of Evidence. Therefore, the trial court correctly concluded that the testimony was "not reliable hearsay." (R. 31).

The State claims that this Court should review this hearsay issue "for correctness, without deference to the lower court's interpretation" because it involves the interpretation of evidentiary Rule 1102 of the Utah Rules of Evidence. (Appellant Br. at 2). In State v. Rhinehart, 2005 UT App 517, this Court addressed whether the defendant's motion to quash the bindover should have been granted due to the improper admission of hearsay evidence at the preliminary hearing. There, this Court applied the following standard of review:

> [W]hen a case presents only a question of law, namely whether hearsay used at the preliminary hearing was admissible under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), or reliable under rule 1102 of the Utah Rules of Evidence, this court will review the bindover determination for correctness giving no deference to the trial court. *See State v. Graham,* 2006 UT 43, ¶ 16 n. 7, 143 P.3d 268.

Rhinehart, 2006 UT App 517, ¶ 8.

In issuing this standard of review as it relates to rule 1102, this court in Rhinehart cited the Utah Supreme Court's decision in Graham. However, Graham does not address rule 1102, nor the issue of reliable hearsay. Valdez therefore asserts that the standard set forth by the Utah Supreme Court in State v. Workman, 2005 UT 66, 122 P.3d 639, is the more appropriate framework for review here:

> Our standard of review on the admissibility of hearsay evidence is complex, since the determination of admissibility "often contains a number of rulings, each of which may require a different standard of review." Norman H. Jackson, *Utah Standards of Appellate Review*, 12 Utah Bar J. 8, 38 (1999). We review the legal questions to make the determination of admissibility for correctness. Hansen v. Hansen, 852 P.2d 977, 979 (Utah 1993). We review the questions of fact for clear error. State v. Parker, 2000 UT 51, Par 13, 4 P.3d 778. Finally, we review the district court's ruling on admissibility for abuse of discretion. Eggett v. Wasatch Energy Corp., 2004 UT 28, Par 10, 94 P.3d 193.

Workman, 2005 UT 66, at ¶ 10.

Valdez does not contest that "a statement of a non-testifying peace officer to a testifying peace officer" qualifies as reliable hearsay under rule 1102. Moreover, that issue is not what is at issue in this case. What is at issue in this case is purely a question of fact: Whether the information contained in the hearsay testimony of an officer came from a non-testifying officer. Because this issue involves purely a question of fact, it should be reviewed for clear error.

a. The State Failed to Present Evidence that the Hearsay Statements Came from a Fellow Peace Officer Under 1102(b)(6)

"Out-of-court declarations offered for the truth of the matter asserted are nadmissible as hearsay unless they fit within one of the established exceptions to the ıearsay rule." State v. Smith, 909 P.2d 236, 239 (Utah 1995). Rule 1102 of the Utah Rules of Evidence delineate particular exceptions to the hearsay rule – particularly, Rule 1102(b)(6), which states that "a statement from a non-testifying peace officer to a estifying peace officer" is reliable, and therefore, admissible hearsay. Utah R. Evid. 1102(b)(6) (1999). Reliability, however, is the touchstone for admissible hearsay.

"Exceptions to the hearsay rule are based on factors that provide assurances of estimonial reliability sufficient to dispense with the usual means of purging testimony of ɛrror and falsehood ...." State v. Smith, 909 P.2d 236, 239 (Utah 1995). Apparently, the Jtah legislature has determined, via Rule 1102 of the Utah Rules of Evidence, that for ɔurposes of a preliminary hearing reliable hearsay is admissible. See, Utah R. Evid. 1102 1999); Utah Const. art. 1, § 12; accord, State v. Rhinehart, 2006 UT App 517, ¶¶ 12-15, 153 P.3d 830. Hearsay proffered at a preliminary hearing is not presumptively reliable or ıdmissible, however.

To be admissible, the proffered hearsay must be reliable. Rule 1102 delineates ɛeveral hearsay exceptions and deems them reliable for the purposes of a preliminary ıearing. For an out-of-court statement, offered for the truth of the matter, to be admissible under Rule 1102(b)(6), the statement must be from a non-testifying officer to the testifying officer. Utah R. Evid. 1102(b)(6) (1999). Thus, unless it is clear to the

magistrate that the statement being made by the testifying officer originated from another officer, Rule 1102(b)(6) is inapplicable.

Presently, the crux of the peace officer's (Agent Robinson) testimony illustrates the lack of reliability because he never identifies whether the source of his hearsay statements at issue here came from a fellow officer, nor does he testify with sufficient specificity that the drugs were found in the carburetor. Agent Robinson's testimony is as follows:

> STATE'S COUNSEL: As a result of that secondary search by the canine, what did you then do?
>
> MR. ROBINSON: Um – another – another search was conducted in that area. Officer Barker and Officer Wolcott – um – searched – um – basically the top of the shed is covered in a tarp and all kinds of hanging material and small objects. Um – there was a slit visible in the tarp. Um – Officer Wolcott reached up through the slit and retrieved a syringe, a small baggie with crystalline residue in it, and digital scales. Um – there – there was also an engine part, a carburetor actually laying right next to the bed. Um – the carburetor was taken apart, and inside, a piece of the carburetor was another baggie, a pink, reddish colored baggie. Um – it also had a crystalline substance in it.

(R. 40: 8). Although Agent Robinson refers to Officers Wolcott and Barker and the search and discovery of paraphernalia, there is nothing indicating how and from whom Agent Robinson learned about the search of the carburetor and discovery of the baggie containing the crystalline substance. See, R. 40: 10-11. Thus, Agent Robinson learned

this information second hand, and for that information to be admitted under Rule 1102(b)(6), it must be clear that it came from another officer. Agent Robinson was never clear about who told him about the carburetor search. Agent Robinson testified as to the other officers' search of the tarp on top of the shed; however, his hearsay testimony concerning the carburetor is not linked to

Moreover, the State's re-direct of Agent Robinson on this matter never clarified who told whom about what. On re-direct, Agent Robinson admitted to not being present or observing the search. (R. 40: 14). He did, however acknowledge that "[t]he officers told [him] what they found." (R. 40:14). But, Agent Robinson did not specifically acknowledge what it was that the officers found. In conjunction with the previous testimony, the only specificity regarding the search was that the officers found a syringe, a small baggie and digital scales. Agent Robinson never clearly stated that the officers told him that they found a baggie after searching the carburetor. Thus, as the trial court observed, the "evidence was a step removed from hearsay and that the Court was asked to simply assume from the circumstances that some officer found the substance in a location that connected it to the Defendant." (R. 32).

Specifically, in its ruling, the trial court predicated this factual finding on the following:

> Officer Robertson [sic] testified that "officer," told him that Officer Watcott reached into a slit in an overhead tarp above the bed and retrieved a syringe and a baggie with a very slight bit of what appeared to be drug residue. He also understood that someone identified and disassembled an automobile carburetor next to the bed and found a baggie with a larger amount of crystal substance. The Court has re-listed to the testimony and cannot determine that Officer Robertson [sic] identified who told him that the carburetor had been searched or who did the searching of the carburetor. Officer Robertson [sic] testified quite specifically that he did not observe either physical search following the K-9 sweeps and had no personal knowledge about who located what or where the items were located.

(R. 33). While Agent Robinson acknowledged that the "officers" told him what they found, the trial court found this too vague of a statement to be reliable under Rule 1102(b)(6). In this acknowledgment, Agent Robinson does not identify which officer told him what, nor does he indicate which officer searched the carburetor and found the baggie. As such, the trial court refused to assume that Agent Robinson's statements came from another agent.

Moreover, Agent Robinson admitted to not being present, but relates the events of that day as if he personally witnessed them – particularly the carburetor search. To rectify this inconsistency, the State calls on this Court to make an assumption – that one of the officers that conducted the search told Agent Robinson about what occurred. However, it is not the court's job to assume that technicalities of hearsay exceptions are satisfied. At the preliminary hearing the State failed to elicit from Agent Robinson exactly who told him what. This matter could have been easily rectified by posing the question: "Agent Robinson, because you were not present during the searches, how did you learn of this information?" Consequently, the State failed to clarify the matter and

the trial court was left without a nexus between Agent Robinson's testimony and another officer.

Also, the trial court acted within its discretion by concluding Agent Robinson's testimony was a "vague, unspecific presentation [and] not 'reliable hearsay.'" (R. 31). During cross-examination of Agent Robinson at the preliminary hearing, the State's attorney asked, and Agent Robinson confirmed, that he was not present, nor did he observe the searches. (R. 40: 14). Subsequently, the State's attorney stated, "[t]he officers told you what they found." And Agent Robinson replied, "Yes." (R. 40:14). Although its possible that the trial court could have inferred that "the officers" referred to Officers Barker, Wolcott or Deputy Nielsen, as a factual matter, the trial court found this insufficient.

In a written ruling, the trial court reaffirmed that the Agent's testimony was unreliable. In the ruling, the trial court stated:

> In this case the State asked the Court to rely not on a specific declaration of a non-testifying officer but upon the assumption of Officer Robertson [sic] that information he had obtained came from one of the several officers who were there and found what was then field tested. This vague, unspecific presentation was not "reliable hearsay" and, without those inferences the testimony presented by the State was insufficient to meet the burden of proof required at a preliminary hearing.

(R. 31). Valdez sides with the trial court that because Agent Robinson did not particularly identify which of the officers actually conveyed that information, the court was left to make an assumption. And, because the trial court was unwilling to make this assumption, insufficient indicia of reliability existed to conclude the testimony satisfied Rule 1102 of the Utah Rules of Evidence.

Conversely, the State contends that the trial court "did not correctly interpret or apply" Rule 1102(b)(6)'s "presumption of reliability and admissibility." (Appellant Br. at 12-14). The State bases this argument on the "fellow officer" rule, otherwise known as the "collective knowledge" doctrine. (Appellant Br. at 12). Although true, the State's application of this rule is misapplied.

The State cites United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), for the proposition that a finding of probable cause is "a practical, not abstract or technical, interpretation of facts" under the "fellow officer" rule. (Appellant Br. at 13). Although in Ventresca the Court states that a finding of probable cause, "like all constitutional requirements, are practical and not abstract[,]" the Court certainly did not disregard the importance of being technical when complying with the rules. U.S. v. Ventresca, 380 U.S. 102, 108 (1965).

The technical aspect that must be satisfied for the "fellow officer" rule to apply, is that there must be a "substantial basis for crediting the hearsay." Ventresca, 380 U.S. at 108. The State further cites Ventresca for the principle that:

> Hearsay information . . . need not reflect the direct personal observations of the officer swearing to the information so long as the magistrate is informed of some of the underlying circumstances supporting the officer's conclusions and his belief that any person involved in providing the information whose identity need not be disclosed was credible or his information reliable.

(Appellant Br. at 13) (quoting Ventresca, 380 U.S. at 107-08). According to the State, an officer's statements are presumptively reliable because there is an assumption that officers communicate to each other truthfully. (Appellant Br. at 14); See, State v.

Nielsen, 727 P.2d 188, 192 (Utah 1986). And as such, an officer's hearsay statements from another officer, offered at a preliminary hearing, are reliable. Valdez agrees with this proposition because it supports the underlying technicality – that the out-of-court statement came from another peace officer.

Essentially, the State's argument on this point only substantiates the legislature's reasoning for allowing officers to give hearsay testimony. What the State's argument does not do is justify that merely because a hearsay statement is made by a testifying officer it should be presumptively reliable. As Rule 1102(b)(6) clearly points out, it is not just that the testifying person is a peace officer, but that the out-of-court statements he is repeating in court came from another officer. Here, Agent Robinson's testimony never identified the source of his information and thus the trial court "was asked to simply assume from the circumstances that some officer found the substance in a location that connected it to the Defendant." (R. 32) (emphasis in original). The State failed to bridge the gap between the events Agent Robinson testified to and who told him about the events.

Therefore, because Agent Robinson did not identify who told him about the search, Rule 1102(b)(6) is inapplicable and the trial court ruled correctly.

b. Rule 1102(b)(3) is Inapplicable Because the Hearsay was Not Proffered to Establish the Foundation or the Authenticity of an Exhibit

First, the State has failed to preserve a Rule 1102(b)(3) issue for appeal and thus it should not be considered. The Utah Supreme Court has ruled that:

> In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801. Here, the record is devoid of anything regarding Rule 1102(b)(3) that the trial court ruled on. Therefore, this Court should not consider the State's argument. If this Court finds, however, that the issue was properly raised, Valdez asserts that Rule 1102(b)(3) is inapplicable.

While Rule 1102(b)(3) indicates that hearsay is reliable for the purpose of establishing foundation for or the authenticity of any exhibit, this rule is inapplicable here. Utah R. Evid. 1102(b)(3) (1999). Under these facts Rule 1102(b)(3) is clearly inapplicable because Agent Robinson's testimony was not given for the purpose of foundation or authenticity of an exhibit. The State's argument supports that conclusion. (Appellate Br. at 17) ("As it happened, no foundation was needed in this preliminary hearing because the baggie was not introduced into evidence.").

Additionally, the State misapplies the purpose behind the rule. As Rule 1102(b)(3) clearly states, such hearsay is reliable and therefore admissible at a preliminary hearing for the purpose of creating foundation or authenticating an *exhibit.* Utah R. Evid. 1102(b)(3) (1999). As the Advisory Committee Notes indicate, such hearsay is admissible only as to exhibits; "[f]or example, proving the chain of custody for controlled substances may be accomplished under this section without calling the

witnesses in the chain." Utah R. Evid. 1102(b)(3) (1999) Advisory Committee Notes. No such circumstance exists here. Therefore, Rule 1102(b)(3) does not apply.

c. 1102(b)(1) Present Sense Impression does Permit the Introduction of Facts Because the Perceiving Party is Unidentified

First, the State has failed to preserve a Rule 1102(b)(1) issue for appeal and thus it should not be considered. The Utah Supreme Court has ruled that:

> In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801. Here, the record is devoid of anything regarding Rule 1102(b)(1) that the trial court considered. Therefore, this Court should not consider the State's argument. If this Court finds, however, that the issue was properly raised, Valdez asserts that Rule 1102(b)(1) is inapplicable.

As the State correctly points out, Rule 1102(b)(1) deems hearsay reliable for the purposes of a preliminary hearing if it would be admissible under the Utah Rules of Evidence. (Appellate Br. at 18); Utah R. Evid. 1102(b)(1) (1999). According to the State, Agent Robinson's testimony is reliable hearsay under Rule 803(1) *Present Sense Impression*. Id. *Present Sense Impression*, however, would not permit the introduction of hearsay evidence that Agent Robinson did not personally perceive.

A *present sense impression* is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately

thereafter." Utah R. Evid. 803(1) (2004). Here, there are two conditions of the Rule 803(1) *present sense impression* that are fatal to its applicability.

First, Rule 803(1) requires that the declarant had made the statement either while perceiving the event or immediately thereafter. Utah R. Evid. 803(1) (2004). Nothing in the record indicates that the perceiving officer's statement was made while perceiving the event or immediately thereafter. As explained in the Advisory Committee Notes of the Federal Rules[1], "[t]he underlying theory of Exception [for presence sense impression] is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Fed. R. Evid. 803; see also, State v. Blubaugh, 904 P.2d 688, 700 (Utah Ct. App. 1995) (finding that because the statements were made while the declarant perceived the events, the statement was admissible); United States v. Manfre, 368 F.3d 832, 840 (8th Cir. 2004) (finding that too much time had elapsed between the event and the statements); State v. Tucker, 68 P.3d 110, 118-19 (Ariz. 2003) (recognizing that "[t]he more time that elapses between the event and the statement, the stronger the possibility that a declarant will attempt, either consciously or subconsciously, to alter his or her description of the event."). There is nothing in the record as to how much time had elapsed between the event, as perceived by the officers, and the statement to Agent Robinson. As such, a proper inquiry into the matter is impossible and therefore Rule 803(1) is inapplicable.

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[1] Rule 803 of the Utah Rules of Evidence "is the federal rule verbatim." Utah R. Evid. 803, Advisory Committee Note.

Second, Agent Robinson never indicated who made the present sense impression statements that he repeated at the preliminary hearing. One of the elements of a statement being admitted as a *present sense impression* is that "the declarant must have personally perceived the event described...." United States v. Mitchell, 145 F.3d 572, 576 (3rd Cir. 1998). In Mitchell, the Court of Appeals rejected the admissibility of out-of-court statements describing an event where the declarant was anonymous. Mitchell involved officers investigating the robbery of a armored truck and the admissibility of an anonymous note regarding information about the get-away cars. Mitchell, 145 F.3d at 574-75.

Reflecting on an earlier decision, the Third Circuit reiterated that "'a party seeking to introduce an anonymous statement carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness.'" Mitchell, 145 F.3d at 576 (citing Miller v. Keating, 754 F.2d 507, 510 (3rd Cir. 1985)). This went to the heart of whether the declarant personally perceived the event. And because the record was "devoid of circumstances indicating by preponderance that the author of the anonymous note actually saw Mitchell change cars" the Court of Appeals reversed the trial court and held that the present sense impression hearsay exception was not satisfied. Mitchell, 145 F.3d at 577.

Similarly here, the State presented no evidence as to who made the statements Agent Robinson repeated in court that would satisfy the requirement that "the declarant must have personally perceived the event described." Mitchell, 145 F.3d at 576. This is precisely what the trial court reasoned:

> In this case [ ] Officer Robertson didn't specifically recite any statements of a non-testifying officer about the larger baggie found in the carburetor. While the testimony was specific about Officer Watcott reaching into the tear in the overhead tarp, the smaller baggie and syringe, by themselves, contain insufficient quantities to establish the felony charge. Officer Robertson was unable to stat who searched the carburetor or who found the larger baggie of suspected drugs. The view of the Court at the time of the preliminary hearing, and now, is that this evidence was a step removed from hearsay and that the Court was asked to simply assume from the circumstances that some officer found the substance in a location that connected it to the Defendant.

(R. 32) (emphasis in original). Agent Robinson never indicated who made the statements that he repeated in court; thus, making the original statements anonymous. See, U.S v. Mitchell, 145 F.3d 572 (3rd Cir. 1998).

Therefore, because Agent Robinson did not sufficiently identify which officer, if any, made the statements he repeated in court, the source is anonymous and the thus unreliable hearsay under Rule 1102(b)(2).

d. There was Insufficient Indicia of Reliability for the Trial Court to have Determined the Agent's Hearsay Statements Complied with Rule 1102(b)(9)

First, the State has failed to preserve a Rule 1102(b)(9) issue for appeal and thus it should not be considered. The Utah Supreme Court has ruled that:

> In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority.

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801. Here, the record is devoid of anything regarding Rule 1102(b)(9) that the trial court ruled on. Therefore, this Court should not consider the State's argument. If this Court finds, however, that the issue was properly raised, Valdez asserts that Rule 1102(b)(9) is inapplicable.

The State claims that "even if the hearsay statement[s] were 'one step removed' from this traditional hearsay exception, subsection (b)(9) of rule 1102 would still deem the statement admissible at preliminary hearing if it had 'similar indicia of reliability.'" (Appellant Br. at 18); Utah R. Evid 1102(b)(9) (1999) ("other hearsay evidence with similar indicia of reliability"). The State's conclusion that "indicia of reliability exist given the testifying agent's own observations of the large baggie after the officers emerged from the shed and the agent's personal knowledge that the carburetor was next to the Defendant's bed[]" omits a necessary nexus. (Appellant Br. at 18).

Although he testified from personal knowledge that a carburetor was located in Valdez's shed, Agent Robinson never conducted nor even witnessed the alleged search of the carburetor (R. 40: 13-14). Thus, for the trial court to bridge that nexus between Agent Robinson's knowledge of the existence of the carburetor and the contraband, it would have to rely on the hearsay testimony regarding the search. However, as the trial court concluded, Agent Robinson never revealed who told him what about the search. (R. 31). Therefore, because the source of the information is in question, there is no indicia of reliability that the trial court determined that it could rely on to make the connection the State calls for.

In sum, because the trial court correctly concluded that Agent Robinson's testimony lacked reliability (R. 31), there is no indication that the court was clearly erroneous in its factual determination. See, State v. Allred, 2002 UT App 291, ¶ 10; and State v. Parker, 2000 UT 51, ¶ 13.

II. The Trial Court Acted Appropriately in Concluding that the State Failed to Present Sufficient Evidence for Bindover

The purpose of a preliminary hearing is for the magistrate to determine whether "the crime charged has been committed and that the defendant has committed it[.]" Utah R. Crim. P. 7(i)(2) (2005). The Utah Supreme Court has clearly stated that the probable cause standard for a preliminary hearing "is the same as the probable cause that the prosecution must show to obtain an arrest warrant[.]" State v. Virgin, 2006 UT 29, ¶ 18. As such, the "prosecution must present sufficient evidence to support a reasonable belief ... while still allowing magistrates to fulfill the primary purpose of the preliminary hearing, ferreting out groundless and improvident prosecutions." State v. Virgin, 2006 UT 29, ¶ 18 (internal citation and quotations omitted).

Here, the State erroneously contends that even without Agent Robinson's hearsay testimony, sufficient evidence existed to establish probable cause for bindover. (Appellant Br. 20). Without Agent Robinson's hearsay statements, the only possible way for the trial court to have found probable cause was based on Robinson's personal knowledge. Agent Robinson's personal testimony, however, was seriously deficient and does not rise to the level of probable cause.

The only personal-knowledge testimony elicited from Robinson regarding the contraband was that he was present when a field test was conducted. (R. 40: 12). Agent Robinson never testified that he personally observed the search that revealed the contraband. Omitting the remaining hearsay testimony – that officers searched the carburetor and discovered a baggie with some crystalline substance – demonstrates that Agent Robinson's personal-knowledge testimony alone only proves that contraband was found and not that it was found in Valdez's shed or in his possession. (R. 40: 8). In order for the trial court to conclude that the contraband was discovered inside the carburetor is to rely on the hearsay.

Furthermore, without the hearsay statements, the trial court could not make any reasonable inferences that a crime was committed and that Defendant committed it. See, Utah R. Crim. P. 7(i)(2) (2005). The State contends that "the magistrate 'may only disregard or discredit evidence that is wholly lacking and incapable of creating a reasonable inference regarding a portion of the prosecution's claim.'" (Appellate Br. at 19) (quoting State v. Virgin, 2006 UT 29, ¶ 24) (internal quotations omitted). Although true, in order for the magistrate to even consider the statements, they must be accepted as evidence. See, State v. Ramirez, 817 P.2d 774, 778 (Utah 1981) (holding that a defendant is "entitled to a determination by the court of the evidence's constitutional admissibility; and once admissible, it may be presented to the fact-finder). Because the trial court found the statements from Agent Robinson to be unreliable hearsay (R. 31) and therefore inadmissible, there can be no inferences from which the trial court could have inferred "in the prosecution's favor." (Appellant Br. at 19).

While Agent Robinson's personal-knowledge testimony may have established that a crime was committed – the positive field test for contraband that he witnessed – without the hearsay statements, nothing ties the contraband to Valdez. See, State v. Virgin, 2006 UT 29, ¶ 18. Therefore, the trial court acted appropriately by not granting the bindover.

a. Regardless of Hearsay Objections, Continuances under Rule 1102(c)(1) are Permissive, and Not Granted as a Matter of Right

Subsection (c) of Rule 1102 states that: "If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing *may* be granted for the purpose of furnishing additional evidence if: (1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover[.]" Utah R. Evid. 1102 (c) (1999) (emphasis added). The State argues that trial court's refusal to grant a continuance so that other officers could be called to testify was "unreasonable, given the lack of a timely objection to the admission of the hearsay[]" and despite no prior continuances had been granted. (Appellant Br. at 20-21). The trial court's decision not to permit the State's continuance, however, was not unreasonable.

The Utah Supreme Court stated that "[i]t is well established in Utah, as elsewhere, that the granting of a continuance is at the discretion of the trial judge, whose decision will not be reversed by this Court absent a clear abuse of that discretion." State v. Creviston, 646 P.2d 750, 752 (Utah 1982). At the conclusion of the preliminary hearing, after the State had moved for a continuance to call additional testimony, the trial court held:

> I'm not going to move the prelim. That was a bad choice, counsel. You know, probable cause can be established on hearsay ... [b]ut this one – all I've got is the officer's received report from someone who said that someone was buying from the defendant. He went to the location, didn't find anything himself. He stepped outside, and then I have a report that an officer found some drugs. I don't have any direct testimony that the drugs were located. Um – this one falls short.

(R. 40: 16-17). The trial court determined that counsel for the State made a poor tactical decision and, implicitly, ruled against a continuance because it would not be judicially efficient to permit a continuance under these circumstances. Therefore, the trial court did not clearly abuse his discretion under Rule 1102(c)(1) by denying a continuance.

b. Untimeliness Does Not Affect the Trial Court's Responsibility of Determining Reliability of the Hearsay Testimony

The State cites Barson v. E.R. Squibb & Sons, 682 P.2d 832 (Utah 1984), for the proposition that because defense counsel did not make a hearsay objection at the time of Agent Robinson's testimony, that it was untimely and the trial court should not have entertained the objection post-testimony. (Appellant Br. at 21). Whether defense counsel made the objection contemporaneous to the hearsay testimony or before judgment, the objection was proper and the trial court appropriately considered it.

In Barson, the Utah Supreme Court held that

> Where there was no clear and definite objection on the basis of hearsay, that theory cannot now be raised on appeal. [Appellant] did raise a hearsay objection after judgment was entered in the case. However, issues raised for the first time in post-judgment motions are raised too late to be reviewed on appeal. Therefore, we are precluded from addressing this assertion of error on the merits.

Barson v. E.R. Squibb & Sons, 682 P.2d 832, 837 (Utah 1984). Barson actually supports Valdez's position that defense counsel made a timely objection for the trial court to properly consider.

First, Barson indicates that there must be a "clear and definite objection on the basis of hearsay[.]" Barson, 682 P.2d at 837. Defense counsel's objection was clear and definite. After Agent Robinson's testimony, defense counsel objected to the testimony as insufficient to establish probable cause because there was no direct evidence. (R. 40: 15-16). Defense counsel's objection was clear enough that the trial court recognized the insufficiency of evidence was based on hearsay and ruled accordingly. This is in line with Barson.

Second, Barson holds that for a hearsay objection to be raised on appeal, it *cannot* be raised post-judgment. Barson, 682 P.2d at 837. Defense counsel's objection was made pre-judgment. At the conclusion of testimony, although not contemporaneous with it, defense counsel made its objection regarding the agent's hearsay. This too complies with Barson.

Furthermore, the State contends that it was the responsibility of defense counsel or the magistrate to have "asked Agent Robinson to identify which officer discovered the large baggie or informed him of its discovery...." (Appellant Br. 21). Contrary to the State's belief, it is not the responsibility of either defense counsel or the magistrate to correct the State's evidentiary deficiencies. See, State v. Rimmasch, 775 P.2d 388, 407 (Utah 1989) (holding that "the burden is on the party proffering the evidence to demonstrate that it has the requisite degree of reliability.").

CONCLUSION AND PRECISE RELIEF SOUGHT

For the aforementioned reasons, Valdez respectfully requests that this court affirm the trial court's refusal to bind over based on insufficiency of evidence.

Respectfully submitted this 25th of Sept 2009.

Margaret P. Lindsay
Counsel for Appellee

C

West's Utah Code Annotated Currentness
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article XI. Miscellaneous Rules
RULE 1102. RELIABLE HEARSAY IN CRIMINAL PRELIMINARY EXAMINATIONS

(a) Statement of the Rule. Reliable hearsay is admissible at criminal preliminary examinations.

(b) Definition of Reliable Hearsay. For purposes of criminal preliminary examinations only, reliable hearsay includes:

(1) hearsay evidence admissible at trial under the Utah Rules of Evidence;

(2) hearsay evidence admissible at trial under Rule 804 of the Utah Rules of Evidence, regardless of the availability of the declarant at the preliminary examination;

(3) evidence establishing the foundation for or the authenticity of any exhibit;

(4) scientific, laboratory, or forensic reports and records;

(5) medical and autopsy reports and records;

(6) a statement of a non-testifying peace officer to a testifying peace officer;

(7) a statement made by a child victim of physical abuse or a sexual offense which is promptly reported by the child victim and recorded in accordance with Rule 15.5 of the Utah Rules of Criminal Procedure;

(8) a statement of a declarant that is written, recorded, or transcribed verbatim which is:

(A) under oath or affirmation; or

(B) pursuant to a notification to the declarant that a false statement made therein is punishable.

(9) other hearsay evidence with similar indicia of reliability, regardless of admissibility at trial under Rules

803 and 804 of the Utah Rules of Evidence.

(c) Continuance for Production of Additional Evidence. If hearsay evidence is proffered or admitted in the preliminary examination, a continuance of the hearing may be granted for the purpose of furnishing additional evidence if:

(1) The magistrate finds that the hearsay evidence proffered or admitted is not sufficient and additional evidence is necessary for a bindover; or

(2) The defense establishes that it would be so substantially and unfairly disadvantaged by the use of the hearsay evidence as to outweigh the interests of the declarant and the efficient administration of justice.

CREDIT(S)

[Adopted effective April 1, 1999.]

Current with amendments received through July 1, 2009.

END OF DOCUMENT

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

State of Utah,	:	
		Ruling
Plaintiff	:	
vs.	:	Date: October 9, 2008
Jesse Valdez,	:	Case Number: 081402004
Defendant	:	Division VII: Judge James R. Taylor

This matter comes before the Court on the State's motion for reconsideration of this Court's ruling that the State failed to meet its burden of proof at the preliminary hearing held August 28, 2008.

The State relied upon a single witness at the preliminary hearing. Probation Officer Curt Robertson testified that he had received "numerous" calls from other law enforcement agencies complaining that Mr. Valdez was involved in selling narcotics. As the agent assigned to Mr. Valdez, Mr. Robertson went with several Provo police officers to the shed where Mr. Valdez lived at 1 a.m. on July 12, 2008. After several knocks Mr. Valdez came to the door and let Officer Robertson in. Mr. Valdez, himself, was searched and nothing was found. A couch was searched and nothing was found. Nothing was found during a quick search of the interior of the shed although the place was extremely cluttered with hundreds of nooks, crannies and automobile parts in which drugs could be hidden. Officer Robertson requested a canine search. Deputy Nielson, a K-9 officer for the Utah County Sheriff's Office arrived. Officer Robertson

was asked to take Mr. Valdez outside while the dog searched. Deputy Nielson came out and reported that the dog alerted on an area near the bed.

Officers other than Officer Robertson searched while Robertson remained outside with Valdez. Nothing was found. The dog conducted another search and Deputy Nielson reported that the dog seemed to be interested in something "higher." Provo officers Barker and Watcott re-entered the shed and searched again. Officer Robertson did not observe the search.

Officer Robertson testified that "officers," told him that Officer Watcott reached into a slit in an overhead tarp above the bed and retrieved a syringe and a baggie with a very slight bit of what appeared to be drug residue. He also understood that someone identified and disassembled an automobile carburetor next to the bed and found a baggie with a larger amount of crystal substance. The Court has re-listened to the testimony and cannot determine that Officer Robertson identified who told him that the carburetor had been searched or who did the searching of the carburetor. Officer Robertson testified quite specifically that he did not observe either physical search following the K-9 sweeps and had no personal knowledge about who located what or where the items were located. Both baggies were field tested and a positive result for methamphetamine was received.

Rule 1102 allows the use of reliable hearsay at criminal preliminary hearings. Reliable hearsay is defined at 1102(b)(6) as "a statement of a non-testifying peace officer to a testifying peace officer." In this case, however, Officer Robertson didn't specifically recite any statements

of a non-testifying officer about the larger baggie found in the carburetor. While the testimony was specific about Officer Watcott reaching into the tear in the overhead tarp, the smaller baggie and syringe, by themselves, contained insufficient quantities to establish the felony charge. Officer Robertson was unable to state who searched the carburetor or who found the larger baggie of suspected drugs. The view of the Court at the time of the preliminary hearing, and now, is that this evidence was a step removed from hearsay and that the Court was asked to simply assume from the circumstances that some officer found the substance in a location that connected it to the Defendant.

It has long been the tradition, in Utah Courts, to protect the basic right to confront witnesses at a preliminary hearing. In State v. Anderson, 612 P2d 778 at 786 (Utah, 1980) the Court noted:

> . . . the ancillary benefits inherent in this preliminary proceeding, e.g., the various aspects of discovery incident to the pretrial examination of prosecution witnesses, would be seriously curtailed by denying the defendant a right of confrontation at the hearing. This curtailment would infringe upon the defendant's right to a fair trial, by denying him the opportunity to prepare an effective defense.
>
> For example, the cross-examination of witnesses at this preliminary stage in a criminal prosecution provides the defendant an opportunity to attack their testimony before it becomes immutable by repetition and the influence, however legitimate, of the prosecution. Also, favorable testimony will often be elicited from the cross-examination of the witnesses at the preliminary examination and contradictory statements made at the hearing may subsequently become important as tools for attacking the credibility of the witnesses at the actual trial.

The specific prohibition from Anderson on the use of hearsay testimony at a preliminary hearing has been overturned by amendment to the Utah Constitution in 1996 (Article 1, Section 12) and the adoption of Rule 1102, Utah Rules of Evidence in 1995. But the fundamental purpose of preliminary hearings remains unaltered. In this case the State asked the Court to rely not on a specific declaration of a non-testifying officer but upon the assumption of Officer Robertson that information he had obtained came from one of several officers who were there and found what was then field tested. This vague, unspecific presentation was not "reliable hearsay" and, without those inferences the testimony presented by the State was insufficient to meet the burden of proof required at a preliminary hearing.

The Court respectfully declines to modify its previous ruling.

Dated this 9th day of October, 2008

Judge James R.
Fourth Judicial D

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